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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re ) CIB DOCKET NO. 98-48  
)  
JERRY SZOKA )  
Cleveland, Ohio )  
)  
Order to Show Cause Why a Cease )  
and Desist Order Should Not Be )  
Issued )

To: The Commission

**COMPLIANCE & INFORMATION BUREAU'S REPLY TO EXCEPTIONS TO  
INITIAL DECISION**

1. The Chief, Compliance & Information Bureau, by his attorneys, submits the following reply to the exceptions to the Summary Decision of Administrative Law Judge Joseph Chachkin, FCC 98D-3, (released September 4, 1998), filed on behalf of Jerry Szoka ("Szoka") on October 5, 1998. In this Reply, the Bureau's failure to respond to a particular argument made by Szoka is not a concession that the matter is meritorious.

2. Szoka has provided no basis for reversing the Administrative Law Judge's Summary Decision ordering Szoka to Cease and Desist from making radio transmissions within the United States without first obtaining a license or waiver from the Commission, and ordering a forfeiture of \$11,000.

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3. The numerous claims raised by Szoka in the Exceptions were the subject of a Motion to Enlarge Issues filed on August 4, 1998, and an Opposition filed by the Bureau on August 14, 1998. On September 4, 1998, Administrative Law Judge Chachkin denied the Motion to Enlarge Issues, in its entirety, as untimely and immaterial (Memorandum Opinion and Order, FCC 98M-113, September 4, 1998).

4. The Exceptions, moreover, reflect that there was indeed justification for the issuance of Summary Decision in this matter. Szoka states that he has been operating without a license on the frequency 96.9 MHz continuously since 1995 and that he operates seven days a week. He selected the frequency himself, after making his own determination, not in accord with Commission processes, that there would be no interference to other stations. He chose to operate with an effective radiated power of 48.8 watts, greatly in excess of the power allowed by the Commission in such circumstances (Summary Decision, para. 4).

5. Szoka did not file an application for a Commission license. He "carefully considered" doing so, but rejected the idea, apparently because the requirements were unacceptable to him. (Exceptions, p.2, section III). He chose not to operate under Part 15 of the Rules (Section 15.239(b), 47 C.F.R. Section 15.239(b)), which permits unlicensed broadcasting when the field strength for such emissions does not exceed 250 microvolts/meters at 3 meters). Furthermore, he chose not to file a petition for rule making seeking allocation of a channel that would allow operation at the higher power he chose.

6. In the Exceptions, Szoka claims that the First Amendment prohibits the government from banning radio transmitting facilities such as his and that the Commission's blanket regulatory ban on micro broadcasting results in "prior restraint on free speech" (Exceptions, p.15, section VI). Szoka's arguments are disingenuous, and ignore the fact that within the power levels of Part 15 of the Commission's rules Szoka would have been allowed to transmit. Moreover, the United States Supreme Court, in supporting the government's right to require a license for the use of the airwaves, has consistently held that there is no fundamental First Amendment right to broadcast:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communications possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum. This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 53 S.Ct 627, 77 L.Ed 1166 (1933).

No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' *National Broadcasting Co. v. United States*, 319 U.S. 190, 227, 63 S.Ct 997, 1014 87 L.Ed 1344 (1943).

*Red Lion Broadcasting Co., Inc., v. FCC*, 395 U.S. 388-389, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

7. The material facts in the matter are not in dispute and the proceeding was indeed

appropriate for a summary decision. Simply put, Szoka started a broadcast station, choosing to ignore Commission procedures for obtaining a radio license because he felt them to be unfair and inconvenient. He chose to start "Grid Radio," select his own frequency, set his own power, and continued to operate in disregard of warnings from Commission engineers.

8. Section 301 of the Communications Act of 1934, as amended, prohibits Szoka's type of radio operation without a license and the Commission has no authority to waive the Act. The right of free speech does not include the right to use radio facilities without a license, and the requirement for such has been upheld by the Supreme Court as a proper exercise of the constitutional power of Congress over commerce. *United States of America v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943). See also, *Stephen Paul Dunifer*, 11 FCC Rcd 718 (1995).

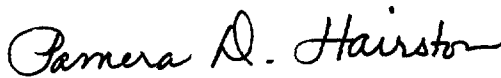
9. Szoka's arguments that the forfeiture is unconstitutional and that it violated the Small Business Regulatory Enforcement Fairness Act were rightfully rejected. Such forfeiture is civil, not criminal, and Commission rules pursuant to the Communications Act of 1934, as amended, contain appropriate safeguards to satisfy Constitutional due process requirements. *U. S. v. Dunifer, supra*; *Stephen Paul Dunifer, supra*. The Administrative Law Judge rightfully concluded that the Small Business Regulatory Fairness Act does not protect small entities engaged in wilful conduct such as Szoka's. The forfeiture assessed Szoka in the Summary Decision is certainly reasonable given the length of time Szoka has operated the unlicensed broadcasting facility wilfully and repeatedly and ignored Commission warnings. Szoka

continues to operate the unlicensed station and has made no attempt to come into compliance with Commission rules.

10. For the above reasons, the Exceptions filed by Szoka should be denied and the Summary Decision of Administrative Law Judge Joseph Chachkin ordering Szoka to cease and desist and assessing a forfeiture of \$11,000 should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

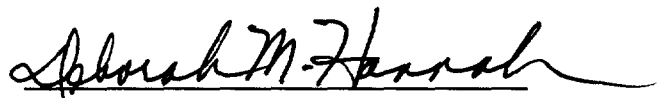
I, Deborah Hannah, certify that I have, on this 19th day of October, 1998, sent by certified mail, return receipt requested, and by regular United States first class mail, a copy of the foregoing "Compliance and Information Bureau's Reply to Exceptions to Initial Decision" to:

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